

Duty of Care in Sport: Time for a Sports Ombudsman?

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Introduction

The first of the seven priority recommendations to be found in Baroness Tanni Grey-Thompson's Duty of Care Review of UK Sport (2017) proposed the establishment of a Sports Ombudsman. The suggestion for such an office had been made by the authors at the consultation phase of the Review. This article sketches out how, in ensuring that national sports governing bodies discharge their duty of care, this Ombudsman might work, the scope of its jurisdiction and the enforcement of its recommendations. Various models are suggested with the emphasis on an accessible, athlete-centred and fully accountable approach to dispute resolution in UK sport. Of particular interest will be the suggested "maladministration" model, which, if ever acted upon, would give a Sports Ombudsman extensive powers of oversight and redress over UK sport and which might, if successful, provide the model for an independent, athlete-accountable, international sports ombudsman's office.

Duty of Care Review

In December 2015, as part of the UK government's Sporting Future strategy,¹ the Minister for Sport asked Baroness Tanni Grey-Thompson to conduct an independent review into the "Duty of Care" sport has towards its participants. In the consultation phase, Tanni Grey-Thompson and her review panel rightly took a "deliberately broad definition of 'Duty of Care' – covering everything from personal safety and injury, to mental health issues, to the support given to people at the elite level."² The Duty of Care in Sport Report (DoC in Sport Report) was given to and published by the Department of Digital, Media, Culture and Sport (DMCS) in April 2017.³

The DoC in Sport Report made seven "Priority Recommendations", the first of which was the creation of a Sports Ombudsman:

"The government should create a Sports Ombudsman (or Sports Duty of Care Quality Commission). This organisation should have powers to hold national governing bodies (NGBs) to account for the Duty of Care they provide to all athletes,

* An earlier, abridged version of this article appeared as J. Anderson and N. Partington, "Duty of Care in Sport: Time for a Sports Ombudsman?" Lawinsport.com, 26 September 2017.

¹ See <https://www.gov.uk/government/publications/sporting-future-a-new-strategy-for-an-active-nation> [Accessed 1 October 2017].

² For the exact terms of reference and the group's membership see Baroness Tanni Grey-Thompson, *Duty of Care in Sport: Independent Report to Government* (Department for Digital, Culture, Media & Sport, London, 2017) Annex A and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/610130/Duty_of_Care_Review_-_April_2017__2.pdf [Accessed 31 August 2017].

³ See <https://www.gov.uk/government/publications/duty-of-care-in-sport-review> [Accessed 1 October 2017].

coaching staff and support staff, providing independent assurance and accountability to address many of the issues covered by this review.”⁴

The priority given to an Ombudsman was related to a key recommendation of the DoC in Sport Report: that national governing bodies (NGBs) should have, as a mandatory condition of future funding, a nominated, Board-level guardian responsible for issues relating to Duty of Care in sport.⁵ Accordingly, the DoC in Sport Report recommended that in order to hold NGBs to account in this regard:

“...consideration should be given to creating a Sports Ombudsman (or Duty of Care Quality Commission) to provide third party assurance. This should be separate from UK Sport (the organisation that allocates both elite funding and medal targets to NGBs) to ensure operational independence in upholding Duty of Care principles to all participants and to maintain public confidence that sport is conducted ethically.”⁶

In a submission during the consultation phase, the authors had suggested the creation of a Sports Ombudsman as “an effective, anonymous, independent and less adversarial means of reviewing and processing complaints about, or integrity issues in, sport and...build up a level of investigatory history...usefully applied to all sports to prevent disputes.”⁷ This brief paper elaborates on that submission and considers four models that might best support the objectives of the DoC in Sport Report. The models, which are based on adaptations of existing schemes, could be implemented discretely or, more attractively, by way of a blended approach encompassing elements of all four in an overarching UK Sports Ombudsman office.

Ombudsmen Elsewhere

The idea of a sector specific Ombudsman or complaint handling body is not a novel one. In the UK alone, the Ombudsman Association lists over 40 such entities ranging from the Financial Ombudsman to the Furniture Ombudsman.⁸ Since 2008, a sports specific Ombudsman has existed for football in the guise of the Independent Football Ombudsman.⁹ Moreover, a dedicated Sports Ombudsman has been mooted for over

⁴ DoC in Sport Report, p. 6.

⁵ See priority no. 3 at DoC in Sport Report, p. 6: “All NGB boards should have a named Duty of Care Guardian. The Guardian should have an explicit responsibility and leadership role to engage with participants across the talent pathways and in community sport, and to provide assurance at board level.”

⁶ DoC in Sport Report, p. 15.

⁷ J. Anderson and N. Partington, “The Scope of the Duty of Care in Sport – A Submission in Relation to the UK Government’s Review” Lawinsport.com, 10 June 2016, <https://www.lawinsport.com/blog/jack-anderson/item/the-scope-of-the-duty-of-care-in-sport-a-submission-in-relation-to-uk-government-s-review> [Accessed 1 October 2017].

⁸ See <http://www.ombudsmanassociation.org> [Accessed 1 October 2017].

⁹ See generally M. Delahanty, “A Guide to England’s Independent Football Ombudsman” Lawinsport.com, 15 April 2015, <https://www.lawinsport.com/blog/littleton-chambers/item/a-guide-to-england-s-independent-football-ombudsman> [Accessed 1 October 2017].

a decade and principally by the former Director of Ethics and Anti-Doping at UK Sport, Michelle Verroken.¹⁰

The establishment of a national Sports Ombudsman has been discussed in other jurisdictions, most notably India¹¹ where the focus has, unsurprisingly, been on cricket-related disputes.¹² In Australia, as part of the development of federal government's current National Sport Plan,¹³ a consultation process is ongoing as to the establishment of a national sports integrity commission in which an Ombudsman's office may have a role.¹⁴ Equally, that Australian process may lead to the foundation of a dedicated national sports integrity tribunal and possibly even on the statutory model found in New Zealand – the Sports Tribunal of New Zealand.¹⁵ More likely, the model that will emerge in Australia will be similar to that found in Canada – the Sport Dispute Resolution Centre of Canada (SDRCC).¹⁶

Of specific note here is that in March 2017, SDRCC produced a comprehensive research proposal on the possible creation of a Sports Ombudsman for Canada. That report, called "Closing the Loop",¹⁷ is of immediate interest for two reasons.

First, after a comprehensive consultation process, the "Closing the Loop" report focused on four issues: (a) mapping the existing complaints and dispute resolution capacities of the various sports entities in Canada and asking about their future needs in this regard; (b) developing recommendations about the jurisdiction and scope of authority of any eventual Ombudsman's office; (c) the (internal) structure or governance of such an Ombudsman and how it might itself be externally accountable; and (d) funding models and how any such model might impact on the Ombudsman's independence. This methodology, and particularly on funding, provides an obvious template for any future research on the possible establishment of a Sports Ombudsman for the UK.

¹⁰ See, for example, House of Commons Science and Technology Committee, *Human Enhancement Technologies in Sport: Second Report of Session 2006–07* (The Stationary Office Ltd, London, 2007) at Ev 87, <https://publications.parliament.uk/pa/cm200607/cmselect/cmsctech/67/67.pdf> [Accessed 1 October 2017].

¹¹ N. Karmath, "Indian Sports Federations Need to Restructure to Meet International Standards" Lawinsport.com, 29 June 2017, <https://www.lawinsport.com/features/item/indian-sports-federations-need-to-restructure-to-meet-international-standards> [Accessed 1 October 2017].

¹² R. Seshank and S. Anirban, "The Impact of the Lodha Committee: BCCI Report on Sports Governance in India" Lawinsport.com, 15 December 2016, <https://www.lawinsport.com/articles/item/the-impact-of-the-lodha-committee-bcci-report-on-sports-governance-in-india> [Accessed 1 October 2017].

¹³ <https://www.ausport.gov.au/nationalsportplan> [Accessed 1 October 2017].

¹⁴ See

[http://www.health.gov.au/internet/ministers/publishing.nsf/Content/54BBB239BD1EA71FCA25817400837B01/\\$File/GH076.pdf](http://www.health.gov.au/internet/ministers/publishing.nsf/Content/54BBB239BD1EA71FCA25817400837B01/$File/GH076.pdf) [Accessed 1 October 2017].

¹⁵ <http://www.sporttribunal.org.nz> [Accessed 1 October 2017].

¹⁶ <http://www.crdsc-sdrcc.ca/eng/home> [Accessed 1 October 2017].

¹⁷ <http://www.crdsc-sdrcc.ca/eng/documents/Closing%20the%20Loop%20-%20A%20Proposal%20for%20a%20Sport%20Ombuds%20in%20Canada%20EN%20final.pdf> [Accessed 1 October 2017].

The second matter of interest emanating from the “Closing the Loop” report is that, although the report rightly prioritised an accessible, nimble and responsive service, it also emphasised that an Ombudsman service must “complement, not duplicate” those services already available to Canadian sport and particularly in the area of formal grievance, dispute resolution or appeals procedures.¹⁸ The procedures referred to may be those internally provided by a NGB or from an external source. In this, the immediate concern with duplication was with the extant services of the SDRCC itself. Under its establishing legislation - Provision 10 of the Act to Promote Physical Activity and Sport (S.C. 2003, c.2)¹⁹ - the SDRCC’s mission is to provide the Canadian sports community with not only a national sports-specific dispute resolution service but also, in a preventative way, to educate and capacity build in the area of dispute resolution.

How a Canadian Sports Ombudsman might complement the SDRCC’s current mandate was of critical concern to the “Closing the Loop” report - the solution ultimately proposed was for the Sport Ombudsman to operate as a sub-unit within the current organisational structure of SDRCC. This is of interest in a UK setting because a body similar to the SDRCC exists in the UK - Sports Resolutions.²⁰ How an Ombudsman might complement Sports Resolutions’ services, whether an Ombudsman might offer competing services or whether the role and functions of such an office could simply be provided through a widening of Sports Resolutions’ current ambit are key issues that will be returned to shortly and need to be debated further.

How might a UK Sports Ombudsman Work

This brief paper considers four models that might be considered both separately but also, and more attractively, by way of a blended approach encompassing all four.

Advocacy and Advice: the USOC Approach

The first model is an adaptation of the United States Olympic Committee’s Athlete Ombudsman.²¹ The USOC Athlete Ombudsman’s core function, mandated by federal law, is very much athlete-centred advocating and providing cost-free, confidential and independent advice for athletes (in the broad generic and American use of that term) on a range of matters and including challenges to team selection; anti-doping violations; the interpretation of commercial agreements; and even citizenship and other eligibility concerns.²² If possible the USOC Athlete Ombudsman attempts to resolve disputes informally but, crucially, in doing so

¹⁸ Sport Dispute Resolution Centre of Canada, “Closing the Loop: Proposal for a Sports Ombuds for Canada”, Final Report, 31 March 2017, p. 2.

¹⁹ <https://www.canlii.org/en/ca/laws/stat/sc-2003-c-2/latest/sc-2003-c-2.html> [Accessed 1 October 2017].

²⁰ <https://www.sportresolutions.co.uk> [Accessed 1 October 2017].

²¹ <http://www.teamusa.org/Athlete-Resources/Athlete-Ombudsman> [Accessed 1 October 2017].

²² Originally, the Amateur Sports Act 1978 (now The Ted Stevens Olympic and Amateur Sports Act - revised in 1998 and including the establishment of an Ombudsman). This federal provision appoints the USOC as the coordinating body for all Olympic-related athletic activity in the United States.

ensures that there is an “equality of arms” in the representative power of the athlete in their dispute with a NGB or other party such as a coach, administrator or sponsor.

By advocating for athletes in this regard, the USOC Ombudsman exercises a considerable amount of “soft” power. On the one hand, athlete-advocates appointed by the Ombudsman ensure that sports bodies comply with their codes of conduct, governance and legal responsibilities and, on the other hand, such advocacy may, by clarifying NGBs’ responsibilities to athletes, reduce the future need for the escalation of disputes to the benefit of athletes’ and administrators’ time and, financial and emotional well-being. Moreover, and to the mutual benefit of both sides, confidence in existing grievance and dispute resolution mechanisms across sport is reinforced.

There is much to recommend the USOC model; nevertheless, and as implied in the DoC in Sport Report, this enhanced “advocacy and advisory” role could be effected by widening the remit of, and diverting more resources to, the British Athletes Commission (BAC).²³ The BAC²⁴ was established in 2004 as an independent membership association to represent the interests of athletes in elite performance sports in Great Britain. It has three core objectives – impartial and confidential advice, athlete representation and athlete advocacy – largely mirroring those of the USOC Ombudsman.

Writing about the recent creation of a dedicated athletes commission for the sport of athletics in Britain, Richard Yates (a former athlete now solicitor and member of the inaugural Commission) rightly made the point that without proper resourcing and without careful, calibrated integration within extant dispute resolution structures, athlete commissions of this nature (and ergo an Ombudsman) are susceptible to becoming no more than a “complaints box” for athletes.²⁵

If a UK Sports Ombudsman is to avoid become another “cobwebbed” complaints box, it must, as suggested, be given a strong voice to advocate for athletes; it must have the resources to make some noise; and NGBs must be obliged, in discharging their duty of care commitments, to listen to what is said.

An Enhanced Independent (Football) Ombudsman

A second possible model is an adaptation of the (aforementioned) Independent Football Ombudsman (IFO) in English football.

At first glance the IFO’s role is authoritative and meaningful – it is the final step in the complaints resolution hierarchy operating in English football. The IFO can

²³ See priority no. 7 at DoC in Sport Report, p. 6: “Government should independently fund the BAC to enable it to provide the best support to participants on talent pathways in Olympic and Paralympic sports. This will increase confidence in grievance and dispute resolution, reducing the need for escalation, saving time, money and emotion.”

²⁴ <http://www.britishathletes.org> [Accessed 1 October 2017].

²⁵ R. Yates, “UK Athletics Creates Long Overdue Athletes’ Commission” Lawinsport.com, 11 July 2017, <https://www.lawinsport.com/features/item/uk-athletics-creates-long-overdue-athletes-commission> [Accessed 1 October 2017].

initiate an adjudication process as to whether in handling a complaint relating to its membership or ticketing policies, spectator accessibility or merchandising, the club or authority in question did so in compliance with its own Code of Conduct or Customer Charter.²⁶

At the time of writing, the most recent adjudication on the IFO's website involved a complaint by a Hull City supporter that a number of benefits promised by the club on purchasing memberships for the 2016/17 season had not materialised. Accordingly, the complainant contended – the Advertising Standards Agency also being involved – the memberships in question had been mis-sold.²⁷ If a complaint is upheld, the IFO has a range of “soft” remedies available to it; for example, recommending that an apology be issued and/or a commitment be given that the behaviour in question will not be repeated. In the Hull City adjudication, the IFO recommended that the club review its customer service arrangements to make them more “user friendly”.²⁸

All of this is of relevance to a UK Sports Ombudsman and particularly if the key function envisaged for such an office is – as would be forcefully suggested – to monitor and ensure that the duty of care commitments and priorities outlined in the DoC in Sport Report (encapsulated contractually in the Duty of Care Charter) are discharged by the various NGBs both in form and in substance.²⁹

It is suggested that, at the very least, a Sports Ombudsman should be given “soft redress” powers. For example, where the Ombudsman upholds a complaint by an individual against a NGB, the following recommendations should be available: an apology; the commitment to provide a service the complainant should have had; on remittal, that the NGB makes the decision it should have done before; that the NGB reconsiders a decision it did not take properly in the first place; that the NGB improve its procedures so similar problems do not happen again; possibly some limited compensatory remedy relating to any reasonable expenses or costs incurred.

Most importantly however, adjudication by the UK Sports Ombudsman would have to be “hard” i.e., where at all possible its recommendations must be binding in nature; in contrast to the IFO's recommendations which, although parties are normally expected to implement them, are non-binding.

²⁶ The IFO is accredited as an Approved Alternative Dispute Resolution (ADR) Body under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. A UK Sports Ombudsman should strive to obtain the same level of regulatory recognition.

²⁷ See, for example, IFO Complaint Ref 17/15, Alleged Mis-selling of Memberships at Hull City, 6 Sept 2017, <http://www.theifo.co.uk/adjudications/hull17iiR.pdf> [Accessed 1 October 2017].

²⁸ IFO Complaint Ref 17/15 at para. 12.

²⁹ See priority no. 6 at DoC in Sport Report, p. 6: “A Duty of Care Charter should be established by government, explicitly setting out how participants, coaches and support staff can expect to be treated and where they can go if they need advice, support and guidance. As part of this, participants who receive funding (in any part of the system) should be offered honorary contracts, which set out the roles and responsibilities of both the sport and the participant.”

Admittedly, under the IFO scheme, where a club considers that it cannot implement an IFO recommendation, it must publish the reasoning behind such a decision and any proposed alternative resolution to the complaint. As seen however in the Premier League's response to IFO recommendations relating to the re-scheduling of an Arsenal FC versus Leicester City FC of 14 February 2016 (and the extent to which it financially discommoded travelling supporters),³⁰ such replies often simply couch an outright refusal to implement IFO recommendations – in this instance relating to a refund scheme for fans – in patronising “corporate-speak”: “The Premier League thanks the IFO for their valuable input, and remains fully committed to working with clubs to develop positive processes in this area.”³¹

The Maladministration Model

First, it is suggested that the most radical jurisdiction that might be given to a UK Sports Ombudsman, and one unique in a global sporting context, would entail powers to investigate cases of alleged “maladministration” by NGBs. Although lacking precise definition, maladministration is a term used frequently in various Ombudsman schemes and in this instance may equate simply to the administrative failings of a sporting body. More specifically, and using those given on the Local Government Ombudsman's (LGO) website,³² examples of maladministration which could give rise to a valid complaint include: delay; failure to reply; poor record keeping; failure to take action or investigate; failure to follow procedures or the law; poor communication; refusal of information or the giving out of misleading information.

Simply put, maladministration is about poor governance generally and thus, radically, the jurisdictional parameters and powers of investigation of a UK Sports Ombudsman could be aligned against UK Sport's recent Code for Sports Governance.³³ In other words, the Sports Ombudsman could be an effective means of ensuring that the principles of good governance demanded by the Code of sports organisations in receipt of public funds are implemented both in form and in substance.

Although the above would appear a radical step in the oversight it might transfer to the Ombudsman with regard to the activities of NGBs and UK Sport more generally; the jurisdiction of the Ombudsman would be delimited in three ways. These

³⁰ http://www.theifo.co.uk/adjudications/IFO_1607.pdf [Accessed 1 October 2017].

³¹ Premier League Statement on the Independent Football Ombudsman, 10 Jan 2017, <https://www.premierleague.com/news/294273> [Accessed 1 October 2017].

³² See <http://www.lgo.org.uk/make-a-complaint/what-we-can-and-cannot-look-at> [Accessed 1 October 2017]. The Local Government and Social Care Ombudsman (LGO) was established in the UK by the Local Government Act 1974. LGO covers local authorities and other specific public bodies within England only. For a thorough overview see M. Sanford, *The Local Government Ombudsman* (House of Commons Library Briefing Paper Number 04117) 17 July 2017.

³³ <http://www.uksport.gov.uk/resources/governance-code> [Accessed 1 October 2017]. See further E. Stephens, “A Guide to the UK's New Code for Sports Governance” Lawinsport.com, 13 March 2017, <https://www.lawinsport.com/articles/item/a-guide-to-the-uk-s-new-code-for-sport-governance> [Accessed 1 October 2017].

jurisdictional limitations can be reconciled with those in place in other, effective Ombudsman schemes operating in the UK – the LGO example is the one used here.

First, and before a matter could be taken up by the Sports Ombudsman, any complainant would have to demonstrate that they tried meaningfully to engage with or exhaust the dispute resolution process of the NGB in question and, on dissatisfaction with the NGB's response, have since taken their complaint to the Ombudsman within a reasonable period of time.

Second, even if the meaningful engagement/time limit hurdle is overcome, this should not mean that a complaint will, as of right, be investigated by an Ombudsman. An initial assessment or triage of the complaint could then be undertaken to see whether, at the discretion of the Ombudsman, an arguable case of maladministration can be identified.

The (fourfold) LGO approach at this "triage" stage again appears to be one that might be usefully adapted in the exercise of the Sport Ombudsman's discretion to investigate:³⁴ the "injustice" step, which would assess the level of personal injustice or prejudice the complainant claims to have been caused as a direct result of the actions or inactions of the NGB; the "fault" test, which would assess the scale, gravity and nature of the fault that the complainant alleges has occurred and whether it is directly linked to the injustice claimed; the "remedy" test, which would assess how likely it is that the Ombudsman would be able to achieve a meaningful outcome to the complaint; the "sporting interest" test, which would assess the level of wider sporting (public) interest arising from the individual case.³⁵

Third, any concern about the final, binding nature of a UK Sports Ombudsman's recommendations, decisions or wider activities could be offset by providing a complainant with a limited judicial review or limited appellate process to an entity such as Sports Resolutions.³⁶ The basis of Sport Resolutions' supervisory jurisdiction, or the extent of a complainant's right of review, would be limited to grounds of error of law, unreasonableness, unfairness, irrationality, proportionality, serious procedural irregularity etc.

The analogy here is to the ordinary courts' residual supervisory jurisdiction over the Financial Ombudsman (FO), seen to good effect recently in the High Court in *Aviva Life & Pensions (UK) Ltd, R (On the Application Of) v McCulloch & Anor*,³⁷ where the High Court quashed a decision of the Financial Ombudsman (FO) on the grounds

³⁴ See <http://www.lgo.org.uk/information-centre/staff-guidance/assessment-code#injustice> [Accessed 1 October 2017].

³⁵ Evidently, where the Ombudsman is of the view that the nature of the complaint or its surrounding circumstances (e.g., an allegations of serious fraud etc) are better dealt with by law enforcement, the matter should be referred to the appropriate (criminal justice) authorities.

³⁶ See <https://www.sportresolutions.co.uk> [Accessed 1 October 2017].

³⁷ *Aviva Life & Pensions (UK) Ltd, R (On the Application Of) v McCulloch & Anor* [2017] EWHC 352. Available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2017/352.html> [Accessed 1 October 2017].

that the FO had provided insufficient reasons for departing from the relevant law regarding misrepresentation in an insurance contract.

It is hoped that the above three safeguards might give NGBs in the UK sufficient assurance to agree to a Sports Ombudsman with a broad “maladministration” jurisdiction, which we think would, in the language of the DoC in Sport Report, be the best way to enable it to hold “NGB’s to account for the Duty of Care they provide to all athletes, coaching staff and support staff, providing independent assurance and accountability to address many of the issues covered by this [Duty of Care in Sport] review.”³⁸

Investigatory Model

At what might be called the appellate level of sports dispute resolution, UK sport is well served by Sports Resolutions. Since its establishment in 1997, it has become the dispute resolution referral service of choice for all sports in the UK³⁹ – administering, for example, the UK’s National (Child) Safeguarding Panel (NSP)⁴⁰ and the National Anti-Doping Panel (NADP).⁴¹ Moreover, where a sports body lacks the capacity to, or may otherwise need (because of the difficult nature of the dispute) assistance in case managing, constituting or chairing a tribunal hearing under its internal rules, Sports Resolutions can provide external assistance on a contract-specific⁴² or ad hoc basis.

It is suggested that the latter “ad hoc” approach has been key to the growing authority of Sports Resolutions in that it has a mutual attraction for the parties in dispute: on the one hand, the NGB is assured that, irrespective of outcome, the matter is being heard pursuant to its regulations; on the other hand, the aggrieved individual or club is assured that, irrespective of outcome, the process is being led by an experienced, independent appointee.

With the above in mind, it must be remembered that outside of the better resourced sports, and single issue disciplinary cases apart, many NGBs lack the time, capacity and skills to initiate and sustain an investigation of any meaningful depth or complexity – a match-fixing investigation being a prime example. Even well-resourced sports, such as football in England, can on occasion be overwhelmed – as has been seen by the ongoing Independent Review into Child Sex Abuse Allegations in Football.⁴³ Moreover, where an issue demands an investigation that goes beyond technical governance matters and into the ethos or culture of a sport, an independent

³⁸ DoC in Sport Report, p. 6.

³⁹ <https://www.sportresolutions.co.uk/services/referral-clauses> [Accessed 1 October 2017].

⁴⁰ <https://www.sportresolutions.co.uk/services/national-safeguarding-panel> [Accessed 1 October 2017].

⁴¹ <https://www.sportresolutions.co.uk/services/national-anti-doping-panel> [Accessed 1 October 2017].

⁴² https://www.sportresolutions.co.uk/uploads/related-documents/SR_Standard_Dispute_Resolution_Clauses.pdf [Accessed 1 October 2017].

⁴³ https://www.sportresolutions.co.uk/uploads/related-documents/Independent_Review_into_Child_Sex_Abuse_Allegations_in_Football_-_22_December_2016_vF.pdf [Accessed 1 October 2017].

investigation by an external entity is the preferred, and even sole, option – seen in 2016 by the UK Sport-mandated review into the culture of British Cycling’s world-class performance⁴⁴ and the ongoing 2017 review into British Canoeing.⁴⁵

An investigatory report by an inquisitive Ombudsman with clear terms of reference and good resourcing can reveal egregious acts or omissions by those who have abused their positions of administrative authority to the detriment of individual participants and the sport’s reputation more generally. The example here is the investigatory report issued in 2005 by the IFO (then the Independent Football Commission (IFC)), which at the FA’s request reported on child protection in football.⁴⁶ The report’s recommendations, which were impressive (and prescient) on improving child protection measures at both the grassroots and elite levels of English football, was largely left in abeyance until the more recent abuse revelations to hit English football - bravely related by Andy Woodward and others in November 2016.⁴⁷

Why didn’t the FA act fully on the 2005 recommendations, what did it know at that time about the extent of child abuse and why was the funding of research by global expert Professor Celia Brackenridge peremptorily stopped in 2003,⁴⁸ are all questions that remain to be answered. To be fair to the FA, they have acknowledged a willingness to do so and 2005 is a year that is central to the terms of reference of the current independent review of child sexual abuse in English football led by Clive Sheldon QC.⁴⁹

In the context of this piece, and acknowledging that child protection in sport is now well monitored in the UK by amongst others the NSPCC’s Child Protection in Sport Unit,⁵⁰ the lesson to be learnt from the IFC report is that a decade of opportunity to further enhance child protection in the UK’s largest participatory sport may have been lost and principally because of the non-binding nature of the IFC’s report, which meant that its findings could be largely ignored by the very entity that commissioned it in the first place.

This should not happen to any prospective UK Sports Ombudsman.

At present, Sports Resolutions is the default option for the administration of such investigations and there is no doubt that it has significant experience in such matters

⁴⁴ <https://www.sportresolutions.co.uk/services/CIR> [Accessed 1 October 2017].

⁴⁵ <https://www.sportresolutions.co.uk/services/canoeinginvestigation> [Accessed 1 October 2017].

⁴⁶ <http://www.theifo.co.uk/reports/ChildProtectionReport.pdf> [Accessed 1 October 2017].

⁴⁷ <https://www.theguardian.com/football/2016/nov/16/andy-woodward> [Accessed 1 October 2017].

⁴⁸ <https://www.theguardian.com/football/2016/dec/29/fa-child-protection-work-celia-brackenridge> [Accessed 1 October 2017].

⁴⁹ https://www.sportresolutions.co.uk/uploads/related-documents/Terms_of_Reference_relating_to_the_Appointment_of_Clive_Sheldon_QC_on_the_Review_in_to_Child_Sexual_Abuse_Allegations.pdf [Accessed 1 October 2017]. Also see: <https://www.theguardian.com/football/2016/dec/06/football-association-appoint-clive-sheldon-qc-child-sex-abuse-review> [Accessed 1 October 2017].

⁵⁰ <https://thecpsu.org.uk> [Accessed 1 October 2017].

based on its world-leading, child-safeguarding investigatory process.⁵¹ Nevertheless, giving a Sports Ombudsman such a discrete, investigatory remit, rather than leaving it subsumed within the range of services offered by Sports Resolutions, has its attractions. The principal attraction is that – and similar to the system that exists in the administration of doping infraction in the UK – a clear distinction remains between those who investigate/recommend sanction (UK Anti-Doping) and the entity (NADP) to whom those who seek to defend or challenge the doping infraction resort.

Consistently, where in the future an investigation is referred to the UK Sports Ombudsman (by DCMS, UK Sport or an individual NGB), although the expectation would be that that any recommendations would be accepted on a consensual basis by the parties, a residual right of appeal would remain to Sports Resolutions. This residual right could be exercised by any party to the investigation or even by the Ombudsman itself where, although its investigation has revealed evidence indicating misconduct, the veracity of such evidence still needs, in due process, to be tested and cross-examined by the defending parties before any sanctions may apply.

This last point is an important one. Although a UK Sports Ombudsman could and should be given extensive inquisitorial powers of investigation, where an allegation of misconduct is made arising out of that investigation, the ‘accused’ must have the right to challenge its evidential basis.

A good (and continuing) illustration of the problems that can arise can be found in one of the more famous, Ombudsman-like, investigatory reports in sport – WADA Independent Person or so called McLaren Reports of 18 July⁵² and 19 December 2016,⁵³ on alleged abuses of doping control processes during the Sochi Winter Olympic Games of 2014. What we have seen is that, although McLaren has said that there is evidence of systematic manipulation of the anti-doping system in Russia, his findings do not necessarily or automatically mean that individual athletes referred to or “implicated” in the reports are guilty of doping infractions – in his own words:

“...we didn't name them for the purposes of determining that they were guilty of anything or had committed an anti-doping rules violation.”⁵⁴

The problem has been that the avenues by which individual athletes implicated in the report, some of whom missed out on the Rio Olympics of 2016, could challenge its findings were not adequately provided for – beyond an ad hoc process involving

⁵¹ <https://www.sportresolutions.co.uk/services/national-safeguarding-panel/investigations> [Accessed 1 October 2017].

⁵² <https://www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-i> [Accessed 1 October 2017].

⁵³ <https://www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-ii> [Accessed 1 October 2017].

⁵⁴ B. Ford, “Are Russian authorities ready to cooperate in drug scandal investigation?” *Espn.com*, 15 Mar 2017 [Accessed 1 October 2017].

an IOC committee⁵⁵ and CAS, in the immediate run up and during the Rio Games.⁵⁶ At present, and noted in a statement issued following a meeting of the IOC President, the WADA President and Richard McLaren in May 2017, the post-investigatory stage to the McLaren Reports has three overlapping, if not necessarily complementary, elements:

“With regard to sanctioning the individual athletes having taken part in the Olympic Winter Games Sochi 2014, all Russian samples are under investigation by the Oswald Commission for manipulation or doping.

With regard to all the other Russian athletes who may have benefited from the Russian system, it is the sole responsibility of the respective International Federation to take the appropriate action.

To address the systematic manipulation of the anti-doping system in Russia as revealed by Prof. McLaren, the respective Disciplinary Commission chaired by the former President of Switzerland, Mr Samuel Schmid, is following up his findings as necessary.”⁵⁷

As the determinations of the Oswald and Schmid Commissions are awaited, the vacuum has been filled with critical media revelations and even more querulous litigation. In September 2017, for example, the New York Times reported that, despite the voluminous McLaren Reports, in 95 of the first 96 athletes whose cases were subsequently reviewed by WADA, anti-doping violations were not to be pursued.⁵⁸ Moreover, a number of athletes implicated by the McLaren Reports have instigated legal proceedings premised on the associated reputational damage. In this, it can be argued that lack of forward planning by WADA and the IOC in providing an accessible means of challenging the evidence gathered in the McLaren Reports, may unfortunately, and to the intense frustration of many involved in anti-doping, be undermining the broader and critical institutional revelations of the McLaren investigation.⁵⁹

This is a lesson that should be heeded if an investigatory remit is given to a UK Sports Ombudsman – yes, by all means give it inquisitorial powers but also provide

⁵⁵ See <http://www.reuters.com/article/us-doping-russia-ioc/ioc-panel-to-have-final-say-on-russian-athletes-cleared-for-rio-idUSKCN10A0RA> [Accessed 1 October 2017].

⁵⁶ See M. Ross and M. Lebbon, “A Summary of the CAS ad hoc Division’s Decisions at the Rio Olympic Games” Lawinsport.com, 15 September 2016, <https://www.lawinsport.com/features/item/a-summary-of-cas-ad-hoc-division-at-the-rio-olympic-games> [Accessed 1 October 2017].

⁵⁷ Joint Statement Following the Meeting of IOC President, Prof. Richard McLaren and WADA President, (IOC, 2 May 2017), <https://www.olympic.org/news/joint-statement-following-the-meeting-of-ioc-president-prof-richard-mclaren-and-wada-president> [Accessed 1 October 2017].

⁵⁸ <https://www.nytimes.com/2017/09/12/sports/olympics/russian-doping-wada.html> [Accessed 1 October 2017].

⁵⁹ See, for example, the Press Release by the Institute of National Anti-Doping Agencies, ‘iNADO Board Urges a Principled Approach to Russian Sanctions’, 22 August 2017, http://www.inado.org/fileadmin/user_upload/Press_Releases/2017_August_iNADO_Statement_o_n_IOC_and_Russia__2017August22_.pdf [Accessed 1 October 2017].

reasonably that the results of such investigations can be held to account adversarially by an implicated party. In the short term, this level of accountability may be a burden on an emerging UK Sports Ombudsman but, in the longer term, this level of transparency would serve only to underpin its authority and credibility.

Preventative and Accessible

There are three final points to be made relating to any suggested UK Sports Ombudsman.

First, the above models have been presented in a somewhat reactionary manner i.e., it is only on foot of a complaint that the Ombudsman becomes engaged. A Sports Ombudsman's office ought however to have a broader, preventative remit. Over time its reports, recommendations and adjudications would provide for consistency of practice in dispute resolution among all agencies and governing bodies operating across UK sport, simultaneously ensuring that such entities provide a better service to their athletes, participants and the wider public. In short, while a UK Sports Ombudsman on the USOC model might provide advice to and advocate for athletes; simultaneously a Sports Ombudsman could be of assistance to NGBs in helping them develop policies and procedures that are equitable and fit for purpose and thus over time abrogating the need for athletes to revert to the Ombudsman.

Of especial interest here is the need for UK sport's bodies (as it is internationally) to develop a consistent, creditable approach to whistle-blowing⁶⁰ – how to encourage more in sport to make properly protected disclosures; how such intelligence may be properly assessed; and the proper treatment of whistle-blowers in the aftermath of their revelations. The experience of whistle blowers in sport is a sorry one and a UK Sports Ombudsman could take the lead in developing a coherent, affirming approach.

Second, and again related to the Sports Ombudsman's preventative remit is that an Ombudsman's office might provide some counter balance to what might be called the "juridification" of sports disputes. This is the reference to the process (and it relates to the increased commercialisation of sport in recent decades) whereby the framing of sports disputes both in how they are regulated and resolved is increasingly formalised, legalised and adversarial in nature.

A prime example of the consequences of juridification can be seen in the perspective of some athletes towards doping: colloquially, if WADA hasn't banned it, I can use it; or more technically, if a substance is not on the current WADA Prohibited List of Substances and Methods, then it can be used without sanction irrespective of that

⁶⁰ C. Davies and J. Mitchell, "Is Whistleblowing in Sport Fit for Purpose? Part 1 – The Current Picture" Lawinsport.com, 16 September 2016, <https://www.lawinsport.com/articles/item/is-whistleblowing-in-sport-fit-for-purpose-part-1-the-current-picture> [Accessed 1 October 2017].

substance or method's experimental nature or its performance enhancing or health consequences.⁶¹

Similarly, when the extant rules of a sport are challenged by the personal circumstances of an athlete - the examples of Kristen Worsley,⁶² Dutee Chand⁶³ and Caster Semenya⁶⁴ are prime illustrations - the reaction of sports governing bodies is often to hide behind formalistic, and often hurtful, legalese relating to that athlete's "eligibility" to compete.

In both of the above scenarios - doping and eligibility - the wider ethical, consensus-building interpretation of the matter in dispute appears secondary to a narrow, adversarial legal construction. In this, it would be welcome if a UK Sports Ombudsman could encompass, along Canadian lines, a Centre for Ethics in Sport,⁶⁵ and which could lead the debate on ethical approaches to issues in sport and including issues such as concussion in contact sports especially among children, parental behaviour at sporting events, mental health issues in elite sport, access and social inclusion in sports etc.⁶⁶

Finally, a key underlying aspect of a UK Sports Ombudsman must be that of accessibility. Paraphrasing the recent UK Supreme Court *Unison* case holding that fees in respect of proceedings at employment tribunals were unlawful because of their effects on access to justice, there is, as in the employer-employee relationship, an "imbalance" of power between NGBs and individuals such that in order for the rights conferred on athletes by a sport's regulation to be effectively upheld, they must be accompanied by dispute resolution mechanisms that are easily accessible at the point of entry.⁶⁷ The UK Sports Ombudsman must be similarly accessible. Although and again quoting directly from *Unison*, breaches of employment (and by analogy sporting) rights "...should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available

⁶¹ See J. Anderson, "The Juridification and Criminalisation of Doping: Time to Revive the Spirit of Sport?" in D Healey and U Haas (eds) *Doping in Sport: An In-Depth Analysis of Impact*, Oxford, Hart-Bloomsbury, 2016, 251-267.

⁶² See <https://www.lawinsport.com/sports-law-news/item/cycling-canada-ontario-cycling-association-the-union-cycliste-internationale-uci-and-canadian-athlete-kristen-worley-settle-human-rights-application-to-promote-inclusive-sporting-environments> [Accessed 1 October 2017].

⁶³ See <https://www.nytimes.com/2017/08/04/sports/olympics/gender-dutee-chand-india.html> [Accessed 1 October 2017].

⁶⁴ See <https://www.theguardian.com/sport/2017/jul/03/caster-semenya-could-be-forced-to-undertake-hormone-therapy-for-future-olympics> [Accessed 1 October 2017].

⁶⁵ <http://cces.ca> [Accessed 1 October 2017].

⁶⁶ See variously M. Beloff, "Sport, Ethics and the Law" (2017)(1) *International Sports Law Review* 3-10; F. Lopez Frias and M. McNamee, "Ethics, Brain Injuries, and Sports: Prohibition, Reform, and Prudence" (2017) 11(3) *Sport, Ethics and Philosophy* 264-280 and M. Mountjoy *et al*, "Safeguarding the Child Athlete in Sport: a Review, a Framework and Recommendations for the IOC Youth Athlete Development Model" (2015) 49 (13) *Br J Sports Med* 883-886.

⁶⁷ *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51 at para. 6. Available at: <https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf> [Accessed 1 October 2017].

if they fail. Otherwise, the party in the stronger bargaining position will always prevail.”⁶⁸

A UK Sports Ombudsman, accessible at the point of entry, can similarly and fairly hold sport’s decision makers to account in a manner that benefits all those who participate in UK sport.

Conclusion

NGBs’ duty of care as outlined in the DoC in Sport Report is not the only duty that exists in sport. All of us who participate in our various sports across the UK have also delegated a duty towards NGBs to ensure that our sport is administered in such a way that it can grow and continue to be enjoyed by future generations. That delegated, implied duty has been given in trust and confidence by us to NGBs. In recent times, some NGBs have breached that duty and undermined our public trust and confidence in our sport. Some NGBs have, distracted by a “win at all costs mentality” of medals and targets, forgotten their (athlete) responsibilities and their (grass) roots. The DoC in Sport Report, if implemented, will have an immediate and positive effect on UK sport; thereafter an independent Sports Ombudsman could, for a fraction of the price of hosting a mega event such as the Olympics, ensure that the DoC in Sport Report’s legacy is a truly enduring one for sports participation in the UK.

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⁶⁸ R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51 at para. 72.